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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE AMEZCUA PADILLA,

Defendant and Appellant.

G055028

(Super. Ct. No. 16CF2234)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Melissa R. McCormick, Judge. Affirmed in part and reversed in part.

Ami Sheth Sagel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E. Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of multiple drug offenses. He was also found to have suffered four prior strike convictions and served two prior prison terms. His appeal, which is limited to the propriety of the prison priors, turns on the interplay between Proposition 47 and the so-called “washout rule.” The washout rule precludes imposition of an enhancement for a prior prison term if, following release on parole, the defendant remained free from both the commission of a new felony and prison custody for five years. Based on a felony conviction appellant suffered in 2010, the trial court determined the washout rule did not apply to prison terms he served in the 1990’s. However, following the passage of Proposition 47, that conviction was reduced to a misdemeanor. In light of that reduction, we conclude the washout rule nullifies appellant’s prison terms from the 1990’s and reverse the enhancements related to those terms. In all other respects, we affirm the judgment.

PROCEDURAL AND LEGAL BACKGROUND

In 1990, appellant was convicted of committing a robbery for which he served two years in prison. In 1998, appellant was convicted of assaulting a peace officer with a deadly weapon. He was sentenced to 15 years in prison and paroled in 2010. Later in 2010, appellant was convicted of felony drug possession and sentenced to 28 months in prison. He was released on parole on August 31, 2011.

In 2014, the voters approved Proposition 47, which allows defendants who have served prison terms for certain low-level felony offenses to petition to have their convictions “designated as misdemeanors.” (Pen. Code, § 1170.18, subd. (f).)¹ Once an offense is designated as a misdemeanor it “shall be considered a misdemeanor for all purposes,” except with respect to the defendant’s right to own and possess firearms. (*Id.*, subd. (k).)

¹

All further statutory references are to the Penal Code.

In 2015, the trial court granted appellant's petition to designate his 2010 felony drug conviction a misdemeanor pursuant to Proposition 47.

On August 24, 2016 – one week shy of five years from his release on parole in 2011 – appellant reoffended in the present case. He was charged with two felony drug offenses, a misdemeanor, and four prior strike convictions. In addition, his prison terms from 1990 and 1998 were alleged to constitute priors within the meaning of section 667.5, subdivision (b), hereafter section 667.5(b). Following his conviction on the underlying charges, the trial court found the prior allegations true. It sentenced appellant to eight years in prison, representing six years for the felonies and one year for each of the prior prison terms.

DISCUSSION

The sole issue before us is whether appellant's prison terms from 1990 and 1998 qualify as priors for purposes of section 667.5(b). Appellant contends they do not because once his 2010 felony conviction was reduced to a misdemeanor pursuant to Proposition 47, they were subject to the washout rule. The Attorney General disagreed in his briefing. There, he took the position the washout rule does not apply because despite the Proposition 47 reduction, appellant still served a prison term for his 2010 conviction, and less than five years transpired from the time he was paroled for that term to the time he committed the present offenses. At oral argument, however, the Attorney General conceded this position was out of step with recent cases, and appellant's claim has merit. For the reasons explained below, we find the Attorney General's concession to be well taken.

Section 667.5(b) authorizes a one-year sentence enhancement “for each prior separate prison term . . . for any felony; *provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody[.]*” (Italics added.)

“The [italicized] phrase is commonly referred to as the ‘washout rule’ where a prior felony conviction and prison term can be ‘washed out’ or nullified for the purposes of section 667.5.” (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229.) “According to the ‘washout’ rule, if a defendant is free from both prison custody and the commission of a new felony for any five-year period following discharge from custody or release on parole, the enhancement does not apply. [Citations.] Both prongs of the rule, lack of prison time and no commission of a crime leading to a felony conviction for a five-year period, are needed for the ‘washout’ rule to apply. This means that for the prosecution to prevent application of the ‘washout’ rule, it must show a defendant either served time in prison or committed a crime leading to a felony conviction within the pertinent five-year period. [Citations.]” (*Ibid.*, italics omitted.)

Because appellant’s 2010 conviction for felony drug possession was designated a misdemeanor under Proposition 47 in 2015 it cannot be considered a felony conviction for purposes of the washout rule. (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 746.) However, as we have noted, appellant did serve time in prison for that conviction, and he committed his present crimes within five years of being released on parole. So, arguably, that prison term could prevent application of the washout rule in this case.

Support for that result can be found in *People v. Acosta* (2016) 247 Cal.App.4th 1072 (*Acosta*). In that case, the court ruled a prior prison term is not affected when the conviction from which it stemmed is designated a misdemeanor under Proposition 47. The court recognized the proposition states that once a felony conviction is designated a misdemeanor, it “‘shall be considered a misdemeanor for all purposes[.]’” (*Id.* at p. 1078, quoting § 1170.18, subd. (k).) However, the court found that phrase applies only to the “status of conviction of a felony” and not “the actual service of a prison term.” (*Ibid.*) Accordingly, it held a defendant who has served a prison term for a felony within five years of his current offense is subject to enhanced punishment pursuant

to section 667.5(b) even if that felony has been reduced to a misdemeanor per Proposition 47. (*Id.* at pp. 1078-1079.)

Acosta, however, was a short-lived decision. The California Supreme Court granted review, and on September 26, 2018 – after briefing in the instant case was complete – it transferred the matter back to the Court of Appeal with directions to vacate and reconsider its decision in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*).

Buycks held a prior felony conviction cannot serve as the basis for a prior prison term enhancement under section 667.5(b) when that conviction has been designated a misdemeanor pursuant to Proposition 47. That’s because the designation effectively negates the requirement that the defendant was previously convicted of a felony. (*Buycks, supra*, 5 Cal.5th at pp. 889-890.) Mindful of the *Acosta* decision, the *Buycks* court stated this is true even if the defendant served a prison term for that conviction. Recall that in *Acosta*, the court drew a distinction between the effect of a Proposition 47 reduction on the defendant’s underlying felony and his attendant prison sentence, finding the reduction would ameliorate the former but not the latter. Speaking to that distinction, *Buycks* disapproved of *Acosta* “to the extent that it held that the ‘misdemeanor for all purposes’ language of section 1170.18, subdivision (k) alters only the status of felony convictions, not the fact that the defendant has served a qualifying prior felony prison term for purposes of a section 667.5, subdivision (b) enhancement.” (*Id.* at p. 889, fn. 13.) The Supreme Court determined this distinction was inconsistent with Proposition 47’s intended purpose, which is to reduce the incarceration costs for offenders who are subject to its terms. (*Id.* at p. 888.) It therefore construed the “misdemeanor for all purposes” language to extend the ameliorative effects of Proposition 47 to mitigate any collateral consequences associated with a felony conviction that is redesignated under the measure. (*Id.* at pp. 877-878.)

Consequently, as the *Acosta* court recognized on transfer from the California Supreme Court, the service of a prior prison term for a felony conviction does not prevent application of the washout rule when that conviction has been designated a misdemeanor pursuant to Proposition 47. (*People v. Acosta* (2018) 29 Cal.App.5th 19, 25, accord, *People v. Baldwin* (2018) 30 Cal.App.5th 648, 654-657; *People v. Kelly* (2018) 28 Cal.App.5th 886, 900-903; *People v. Warren* (2018) 24 Cal.App.5th 899, 914-977.) In that sense, “The enactment of Proposition 47 . . . modified the literal terms of the washout provision of section 667.5(b), in that a felony reduced to a misdemeanor under section 1170.8 shall be construed a misdemeanor for all purposes, including the effect of any punishment resulting therefrom. Any prior prison term served as a result of a felony reduced to a misdemeanor under section 1170.18 shall not be construed as prison custody under the washout provision of section 667.5(b).” (*People v. Kelly, supra*, 28 Cal.App.5th at p. 901.)

That being the case, it is immaterial for purposes of our analysis that appellant served time in prison within five years of his current offenses. Because the felony conviction for which that time was imposed has been designated a misdemeanor for all purposes under Proposition 47, the washout rule applies to nullify his prison terms from 1990 and 1998.

DISPOSITION

The trial court’s true findings on the prior prison term allegations pursuant to section 667.5(b) are reversed, and the one-year enhancements imposed under that

section are stricken. The clerk of the superior court shall prepare an amended abstract of judgment reflecting this modification and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.